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18-P-1568

Appeals Court

RHEA R.¹ & others² vs. DEPARTMENT OF CHILDREN AND FAMILIES.

No. 18-P-1568. September 14, 2020.

Department of Children & Families. Adoption, Foster parents.
Massachusetts Tort Claims Act. Governmental Immunity.
Negligence, Governmental immunity.

In prior proceedings, we reversed a judgment of the Superior Court that dismissed the plaintiffs' complaint on the ground of sovereign immunity, based on our conclusion that a written foster care agreement between the parties brought the plaintiffs' claims within the saving provision of G. L. c. 258, § 10 (j) (1). See Rhea R. v. Department of Children & Families, 96 Mass. App. Ct. 820, 825-826 (2020). The Department of Children and Families (department) filed an application for further appellate review and, though it denied further review, the Supreme Judicial Court remanded the case to this court "for consideration of the argument raised by the [department] for the first time in its application for further appellate review -- that G. L. c. 119, §§ 33B and 51E, precluded the department from disclosing the information at issue in the complaint." Rhea R. v. Department of Children & Families, 485 Mass. 1101, 1101 (2020).³ The procedural and factual background of the parties'

¹ A pseudonym.

² Ralph R., and Ramona R., a minor, by her parents and next friends, Rhea R. and Ralph R. The parties' names are pseudonyms.

³ We understand the order of remand by the Supreme Judicial Court to oblige us to consider the department's argument without regard to any question of waiver, based on the department's

arguments are laid out in our prior opinion, and we do not repeat them here.

We discern in the department's new argument no reason to modify our conclusion in our prior opinion. Indeed, our review of the statutory scheme invoked by the department suggests that it is entirely consistent with the department's performance of the obligations it undertook in the foster care agreement to "provide the parents with sufficient information about a foster child proposed for placement in their home to allow them 'knowledgeably [to] determine whether or not to accept the child.'" Rhea R., 96 Mass. App. Ct. at 825.

As a threshold matter, we observe that, though reports made pursuant to G. L. c. 119, §§ 51A-51D, must be kept confidential and disclosed only to a limited class of individuals, disclosure to others beyond those specifically identified in the statute is authorized with "the written approval of the commissioner." G. L. c. 119, § 51E.⁴ Passing the question whether the

failure to raise the issue in any fashion until after release of our published opinion. Separately, though in the prior proceedings before us the department raised waiver to bar the plaintiffs' alternative theory that the department could be held subject to liability on the ground that the department was the original cause of the harm forming the basis for the plaintiffs' claims, and we accordingly applied waiver against the plaintiffs as to that theory, see Rhea R., 96 Mass. App. Ct. at 823 n.7, we do not now undertake separate consideration of the plaintiffs' contention that the department was the original cause of the harm.

⁴ General Laws c. 119, § 51E, provides, in relevant part:

"The department shall maintain a file of the written reports prepared under this section and sections 51A to 51D, inclusive. These written reports shall be confidential. Upon request and with the approval of the commissioner, copies of written reports of initial investigations may be provided to: (i) the child's parent, guardian or counsel, (ii) the reporting person or agency, (iii) the appropriate review board, (iv) a child welfare agency of another state for the purpose of assisting that agency in determining whether to approve a prospective foster or adoptive parent, or (v) a social worker assigned to the case. No such report shall be made available to any persons other than those specified in this section without

commissioner's approval of the standard form foster care agreement entered into between the department and foster families, together with the execution of such an agreement with a particular foster family, might alone constitute written approval by the commissioner to disclose materials within the scope of those the department agrees to provide to putative foster families prior to placing a child in their care, it plainly is within the department's power to obtain the necessary approval to perform the disclosure obligations it undertook in its agreement. Contrary to the department's contention, disclosure of such information does not jeopardize the statutory purpose of confidentiality of such information. As set forth in the foster care agreement, the foster family is required to maintain the confidentiality of all information provided to it concerning the foster child, and the foster family is bound by the same standards of confidentiality as the department and its employees.

Quite apart from the absence of support in the statute on which the department's argument rests, other provisions within the statutory and regulatory framework governing the relationship between the department and foster families lend further support for the conclusion that the department's performance of its contractual obligation to disclose such information to foster families is expected, rather than prohibited. Pursuant to G. L. c. 119, § 23 (e), the department is obliged to provide to prospective foster families a completed child profile including (but not limited to) "(i) a history of the child's previous placements and reasons for placement changes; (ii) a history of the child's problem behaviors and mental and emotional problems; (iii) educational status and school related problem behaviors; and (iv) any other necessary psychological, educational, medical or health information." And pursuant to 110 Code Mass. Regs. § 12.06 (2008), the department "may release to any [d]epartment provider or other individual or entity acting at the [d]epartment's request, any records, documents, or information which in the judgment of the [d]epartment is necessary for service delivery to children in the care or custody of the [d]epartment."

In short, the department's contention that it was statutorily prohibited from sharing with the plaintiff foster family the information contained in its records concerning

the written and informed consent of the child's parent or guardian, the written approval of the commissioner, or an order of a court of competent jurisdiction."

possible sexual abuse perpetrated by the foster child (as required under its written foster care agreement) is belied by the governing statutes and regulations. The plaintiffs' claims are not barred by sovereign immunity. The disposition of this case is stated in Rhea R., 96 Mass. App. Ct. at 826.

So ordered.

Gregory A. Hession for the plaintiffs.

Abigail Fee, Assistant Attorney General, for the defendant.